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## FOIL UPDATE 20<sup>th</sup> October 2021



### A child pedestrian may be 10% contributorily negligent

*Gul (Protected Party) v McDonagh and another (2021) EWHC Civ 1503*

The claimant/appellant, then aged 13 years and 8 months, was crossing a residential road when he was struck by a car being driven by the first defendant, travelling at about 40 mph. He sustained very serious injuries.

The question of contributory negligence was tried as a preliminary issue before a Deputy High Court Judge who found that the claimant had been contributorily negligent and that it was just and equitable to reduce his damages by 10%.

The claimant appealed that decision contending that the judge should not have made any reduction. He advanced three Grounds of Appeal:

(1) The judge's reasoning that the claimant ought to have appreciated the speed of the car was flawed because he equated the claimant's perception with that of a number of witnesses who saw and heard the car in very different circumstances.

(2) The judge was wrong to conclude that the claimant was partly responsible for the damage he sustained, having regard to the questions of blameworthy conduct and causative potency.

#### IN BRIEF

The Court of Appeal dismissed the claimant's appeal against a judge's finding that he had been 10% contributorily negligent, when, as a child pedestrian, crossing a residential road, he had been struck by the first defendant's speeding car.

(3) The judge was wrong to find, in the event that the claimant bore any such responsibility, that it was just and equitable to make a reduction of 10% from his claim.

Dismissing the appeal, the Court of Appeal held that as regards Ground 1, while the views of all three groups of witnesses were rather different from that of the claimant, the judge, who had recited their evidence, where they were, and what they saw (and heard) in some detail, had not made the mistake of equating their viewpoint with that of the claimant. He had not made the mistake of thinking that because other witnesses in a different situation had commented on how badly and how fast the car was being driven, that meant that the claimant should have reached the same conclusion. The judge was simply identifying that the first defendant's driving was bad and fast (as other witnesses had noticed) as a way of introducing the question he posed, and answered, namely whether the same should have been apparent to an adult looking to his right before crossing the road. He then, correctly, went on to consider whether the same could be said of a reasonable 13-year-old.

Three questions arose when considering Ground 2 and whether a reduction should be made to a claimant's damages:

(1) Was the claimant at fault?

(2) If so, did the claimant suffer damage (partly) as a result of his fault? Or in other words, was the claimant's fault a cause of his damage?

(3) If so, to what extent is it just and equitable to reduce his damages?

The first two questions were in principle hard-edged or yes/no questions. Either the claimant was at fault, or he was not; either his fault was a cause of the damage he suffered, or it was not. The third question was equally clearly not a yes/no question but a question of degree.

For the purposes of the first question, namely whether the claimant was at fault, it was well established that "fault" did not mean a breach of a legal duty owed to someone else. It simply meant that the claimant failed to take reasonable care as he should have done for his own safety or property. In the present case the conclusions of the judge established that the claimant was at fault in this sense.

The second question was one of causation. In the present case the judge's conclusion that if the claimant had done either of the things he should reasonably have done (waited before crossing, or kept a lookout as he was crossing) the accident would have been avoided was sufficient to establish that his fault was one of the causes of his damage.

That left the third question, namely to what extent it was just and equitable to reduce his damages. That required the court to have regard to his share in the responsibility for the damage.

Here the Judge found the claimant not to have acted as a reasonable 13-year-old should have done, and if Ground 1 was dismissed, that finding stood and was sufficient to establish that the claimant was at fault.

The question for the appellate court when considering Ground 3 was whether the judge's decision that it was just and equitable that the claimant's damages be reduced by 10% exceeded the ambit of reasonable disagreement and was outside the range of reasonable determinations, it not being

suggested that the judge made any identifiable error. It was common ground that 10% was an unusually low reduction, but there was no basis for saying that it was not open to the judge to adopt it. It was impossible to say that it is outside the range of reasonable determinations.

The full judgment may be found at: [Gul v McDonagh & Anor \[2021\] EWCA Civ 1503 \(19 October 2021\) \(bailii.org\)](#)

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